

APPEAL NO. 180603  
FILED APRIL 19, 2018

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 24, 2018, with the record closing on February 13, 2018, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does extend to traumatic brain injury; (2) the compensable injury of (date of injury), does not extend to cervical spondylosis, headaches, right shoulder rotator cuff tear, supraspinatus and infraspinatus tendinopathy with bursal fraying, anterior tilting and lateral downsloping of Type 1 acromion, AC joint arthropathy, subscapularis tendinopathy with partial tearing, right shoulder labral tear with cysts and glenohumeral joint osteoarthritis, or mild right hip joint osteoarthritis; (3) the appellant (claimant) reached maximum medical improvement (MMI) on May 25, 2016; (4) the claimant's impairment rating (IR) is three percent; and (5) the claimant did not have disability from February 20, 2017, through the date of the CCH. The claimant appealed, disputing the ALJ's determinations of MMI, IR, and disability. Additionally, the claimant disputed that portion of the ALJ's extent-of-injury determination that was unfavorable to him. The respondent (carrier) responded, urging affirmance of the disputed MMI, IR, disability, and extent-of-injury determinations.

That portion of the ALJ's extent-of-injury determination that the compensable injury extends to traumatic brain injury was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part; reversed and rendered in part; and reversed and remanded in part.

The parties stipulated, in part, that: the claimant sustained a compensable injury on (date of injury); the carrier has accepted a compensable injury in the form of a minor concussion, scalp contusion, right hip contusion, right shoulder strain, and cervical strain; and the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. R) as the designated doctor to address MMI, IR, extent of injury, and return to work. The claimant testified that he fell off of the back of his work truck landing on the pavement. The claimant specifically testified that his head hit the pavement.

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the

evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

In reviewing a “great weight” challenge, we must examine the entire record to determine if: (1) there is only “slight” evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See *Cain, supra*.

### **DISABILITY**

The ALJ’s determination that the claimant did not have disability from February 20, 2017, through the date of the CCH is supported by sufficient evidence and is affirmed.

### **EXTENT OF INJURY**

That portion of the ALJ’s determination that the compensable injury of (date of injury), does not extend to cervical spondylosis, right shoulder rotator cuff tear, supraspinatus and infraspinatus tendinopathy with bursal fraying, anterior tilting and lateral downsloping of Type 1 acromion, AC joint arthropathy, subscapularis tendinopathy with partial tearing, right shoulder labral tear with cysts and glenohumeral joint osteoarthritis, or mild right hip joint osteoarthritis is supported by sufficient evidence and is affirmed.

The ALJ determined that the compensable injury of (date of injury), does not extend to headaches. As previously noted, the carrier has accepted a minor concussion and scalp contusion as part of the compensable injury. Further, the ALJ determined that the compensable injury extends to traumatic brain injury and that determination has become final pursuant to Section 410.169. On the date of injury, records reflect that the claimant was transported from the scene of the accident to the hospital by ambulance. The medical records in evidence from the paramedics reflect the claimant had pain in his head. A traumatic injury was given as the primary impression. Numerous medical records in evidence document the claimant’s headaches. The designated doctor, Dr. R, examined the claimant on May 25, 2016, and opined that the compensable injury of (date of injury), extends to headaches.

Under the facts of this case as discussed above, the ALJ's determination that the compensable injury does not extend to headaches is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse that portion of the ALJ's determination that the compensable injury of (date of injury), does not extend to headaches and render a new decision that the compensable injury of (date of injury), does extend to headaches.

### **MMI/IR**

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

The ALJ determined that the preponderance of the other medical evidence is not contrary to Dr. R's certification that the claimant reached MMI on May 25, 2016, with a three percent IR, using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). Dr. R examined the claimant on May 25, 2016, for purposes of MMI and IR and provided alternative certifications. The first certification from Dr. R based on an examination date of May 25, 2016, certified that the claimant reached MMI on May 25, 2016, with a three percent IR. This certification rated and considered a minor concussion, scalp contusion, right hip contusion, cervical strain, and right shoulder strain. As previously discussed, a new decision has been rendered that the compensable injury includes headaches. Dr. R did not consider and rate the entire compensable injury and his certification cannot be adopted. Accordingly, we reverse the ALJ's determination that the claimant reached MMI on May 25, 2016, and the claimant's IR is three percent.

There are two other certifications from Dr. R in evidence based on the examination date of May 25, 2016. Dr. R certified that the claimant has not reached MMI for the following conditions: minor concussion, scalp contusion, right hip contusion, right shoulder strain, cervical strain, headaches, and a right shoulder labral tear with cysts and glenohumeral joint osteoarthritis. The ALJ's determination that the compensable injury does not extend to a right shoulder labral tear with cysts or glenohumeral joint osteoarthritis was affirmed. This certification considers and rates conditions that are not part of the compensable injury and cannot be adopted.

The final certification from Dr. R in evidence based on the examination date of May 25, 2016, also certified that the claimant had not yet reached MMI. This certification considered and rated the minor concussion, scalp contusion, right hip contusion, right shoulder strain, cervical strain, cervical spondylosis, headaches, supraspinatus and infraspinatus tendinopathy with bursal fraying, anterior tilting and lateral downsloping of Type 1 acromion, AC joint arthropathy, subscapularis tendinopathy with partial tearing, right shoulder labral tear with cysts and glenohumeral joint osteoarthritis, and mild right hip joint osteoarthritis, in addition to anxiety disorder, essential hypertension and other conditions. This certification considers and rates, in part, conditions that have been determined not to be part of the compensable injury and cannot be adopted.

Dr. R examined the claimant on March 28, 2017, and certified that the claimant reached MMI on February 20, 2017, with a three percent IR, using the AMA Guides. This certification considered and rated a minor concussion, scalp contusion, right hip contusion, right shoulder strain, cervical strain, headaches, and labral tear. As previously noted, the ALJ's determination that the compensable injury does not extend to a right shoulder labral tear has been affirmed. This certification considers and rates a condition that has been determined is not part of the compensable injury. Accordingly, this certification cannot be adopted.

The only other certifications of MMI/IR in evidence are from a carrier-selected required medical examination doctor, (Dr. B). Dr. B examined the claimant on December 14, 2017. Dr. B certified in four different certifications of MMI/IR that the claimant reached MMI on May 26, 2016, with a three percent IR, using the AMA Guides.

In the first certification, Dr. B considered and rated the following conditions: a concussion, cervical sprain/strain, right hip contusion, right shoulder strain, and scalp contusion. This certification from Dr. B does not consider headaches which have been determined to be part of the compensable injury. Accordingly, this certification cannot be adopted.

In the second certification, Dr. B considered and rated the following conditions: concussion “(synonymous with mild traumatic brain injury),” scalp contusion, right hip contusion, right shoulder strain, cervical strain, headaches, and labral tear. This certification considers and rates a condition that has been determined not to be part of the compensable injury, a labral tear. Accordingly, this certification cannot be adopted.

In the third certification, Dr. B considered and rated the following conditions: concussion, cervical strain, right hip contusion, right shoulder strain, scalp contusion, headaches, labral tear, and traumatic brain injury. This certification considers and rates a condition that has been determined not to be part of the compensable injury, a labral tear. Accordingly, this certification cannot be adopted.

In the fourth certification, Dr. B considered and rated the following conditions: a concussion, cervical strain, right hip contusion, right shoulder strain, scalp contusion, headaches, labral tear, traumatic brain injury, bradycardia, cervical spondylosis, anxiety disorder, hypertension, ischemic heart disease with disease of the circulatory system, malignant neoplasm or low lung volumes, mild right hip joint osteoarthritis, mild to moderate gluteus minimus tendinitis, anterolateral gluteus medius tendinitis, anterior tilting and lateral downsloping of Type 1 acromion, mild to moderate acromioclavicular joint arthropathy, and mild to moderate subscapularis tendinopathy with mild articular surface partial tearing. This certification considers and rates conditions that have been determined not to be part of the compensable injury, including a labral tear, cervical spondylosis, anterior tilting and lateral downsloping of Type 1 acromion. Accordingly, this certification cannot be adopted.

There are no other certifications in evidence. Accordingly, we remand the MMI and IR issues to the ALJ for further action consistent with this decision.

### **SUMMARY**

We affirm the ALJ’s determination that the claimant did not have disability from February 20, 2017, through the date of the CCH.

We affirm that portion of the ALJ’s determination that the compensable injury of (date of injury), does not extend to cervical spondylosis, right shoulder rotator cuff tear, supraspinatus and infraspinatus tendinopathy with bursal fraying, anterior tilting and lateral downsloping of Type 1 acromion, AC joint arthropathy, subscapularis tendinopathy with partial tearing, right shoulder labral tear with cysts and glenohumeral joint osteoarthritis, or mild right hip joint osteoarthritis.

We reverse that portion of the ALJ's determination that the compensable injury of (date of injury), does not extend to headaches and render a new decision that the compensable injury of (date of injury), does extend to headaches.

We reverse the ALJ's determination that the claimant reached MMI on May 25, 2016, and remand the issue of MMI to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is three percent and remand to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

Dr. R is the designated doctor in this case. The ALJ is to determine whether Dr. R is still qualified and available to be the designated doctor. If Dr. R is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and IR.

Section 401.011(30) provides MMI means the earlier of: (A) the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated; (B) the expiration of 104 weeks from the date on which income benefits begin to accrue; or (C) the date determined as provided by Section 408.104. The ALJ is to either take a stipulation from the parties or make a finding as to the date of statutory MMI.

The ALJ is to inform the designated doctor that the compensable injury of (date of injury), extends to a minor concussion, scalp contusion, right hip contusion, right shoulder strain, cervical strain, headaches, and traumatic brain injury. The ALJ is to inform the designated doctor that the compensable injury of (date of injury), does not extend to cervical spondylosis, right shoulder rotator cuff tear, supraspinatus and infraspinatus tendinopathy with bursal fraying, anterior tilting and lateral downsloping of type 1 acromion, AC joint arthropathy, subscapularis tendinopathy with partial tearing, right shoulder labral tear with cysts or glenohumeral joint osteoarthritis, or mild right hip joint osteoarthritis. The ALJ is to request the designated doctor to give an opinion on the claimant's date of MMI and rate the entire compensable injury in accordance with the AMA Guides considering the medical record and the certifying examination. The ALJ is also to inform the designated doctor of the date of statutory MMI, and that the date of MMI cannot be after the statutory date of MMI. The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The ALJ is then to make a determination on MMI and IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the ALJ, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM  
1999 BRYAN STREET, SUITE 900  
DALLAS, TEXAS 75201-3136.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Veronica L. Ruberto  
Appeals Judge

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Carisa Space-Beam  
Appeals Judge